

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LOUIE MORENO, JR.,

Petitioner,

vs.

SCOTT KERNAN, Warden,

Respondent.

No. 2:04-cv-00289-JKS-DAD

ORDER

Petitioner, a state prisoner proceeding *pro se*, has filed this application for a writ of habeas corpus under 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge under 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On November 1, 2007, the Magistrate Judge filed Findings and Recommendations herein which were served on all parties and which contained notice to all parties that any objections to the Findings and Recommendations were to be filed within twenty days. Respondent has filed objections to the Findings and Recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this Court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, with particular attention to those portions relevant or pertinent to the objections raised, the Court finds the Findings and Recommendations to be supported by the record and by proper analysis. In *Gibson v. Ortiz*, 387 F.3d 812 (9th Cir. 2004), the Ninth Circuit held that the pre-1999 CALJIC 2.50.01, used in conjunction with CALJIC 2.50.1, was contrary to *In re Winship*, 397 U.S. 358 (1970) and *Sullivan v. Louisiana*, 508 U.S. 275 (1993). As Respondent candidly acknowledges, this Court is bound by decisions of Court of Appeals for the Ninth Circuit. See *Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc). Were we writing on a clean slate we might be persuaded by the objections filed by the state but, as the State concedes,

controlling authority dictates the result in this case. The State will have to make its arguments to an *en banc* assembly of the appellate court or, failing that, to the United States Supreme Court.

Accordingly, IT IS HEREBY ORDERED THAT:

1. The Findings and Recommendations filed November 1, 2007, are adopted in full;
2. Petitioner's application for a writ of habeas corpus is GRANTED;
3. Unless the State of California retries Petitioner Louie Moreno, Jr. within a reasonable time consistent with California's speedy trial requirements after the judgment in this case becomes final upon direct review, Petitioner must be released from custody; and
4. The Clerk of the Court to enter final judgment accordingly.

Dated: January 16, 2008

s/ James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
United States District Judge